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No. 85-766

In The Supreme Court Of The United States

OCTOBER TERM, 1985

JULIA H. TASHJIAN,
Secretary of the State of Connecticut,
Appellant,

v.

REPUBLICAN PARTY OF THE STATE OF CONNECTICUT, LOWELL P. WEICKER, JR., STEWART B. McKINNEY, NANCY L. JOHNSON and THOMAS J. D'AMORE, JR.,
Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

AMICUS CURIAE BRIEF OF WILLIAM J. CIBES, JR. (Associate Professor of Government, Connecticut College), CLYDE McKEE (Professor of Political Science, Trinity College), SARAH McCALLY MOREHOUSE (Professor of Political Science, University of Connecticut at Stamford), WAYNE R. SWANSON (Professor of Government, Connecticut College), POLITICAL SCIENTISTS, IN SUPPORT OF APPELLANT

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STATEMENT OF INTEREST OF AMICI

Amici who have joined this brief are professors of political science at colleges located in the state of Connecticut. In that capacity, amici teach and study the political party system as it pertains to government, particularly in Connecticut, where they live and work. Because of this convergence, amici have a special insight into the party system and election process in Connecticut. Amici believe that the state legislature acts properly in regulating participation in primary elections so that those who associate with political parties are protected from those who attempt to intrude upon their association.

In addition, an author of this brief, William Cibes, is a state representative as well as an associate professor of political science. He thus brings a unique perspective to the issues facing the Court in this matter.

The parties to this appeal have consented to the filing of this brief by amici, and the consent letters are filed with this Court.

SUMMARY OF ARGUMENT

Those who challenge a state's regulation of primary elections on the ground that the freedom of association of members of a political party is thereby violated must first demonstrate that the action of the state has substantially infringed the protected right to associate for political purposes. This Court has clearly delineated, in a series of cases, criteria for determining when such a substantial infringement has occurred. A severe burden on the right to associate is imposed if a party is prevented from attracting new members to its ranks, thus freezing the political status quo. A substantial infringement occurs if a state a) forces a political party to accept members it does not desire, b) regulates purely internal, non-electoral processes of the party, or c) infringes on intrinsic aspects of a completely private organization. There may also be a significant burden if the regulation of the state has an extra-territorial reach. Since none of these criteria of "substantial infringement" is present in this case, and since no substantial infringement in fact occurs in this case, the state need not demonstrate that it has a compelling interest in restricting to members of a political party the right to participate in a primary election of that party. Instead, the state need only demonstrate the legitimacy of its interest in adopting the statute at issue here. As amici political scientists will demonstrate, a state has a legitimate interest in preventing major political parties from making short-term expedient decisions which undermine the long-term integrity of the electoral process. Because the Circuit Court has erred in requiring that Connecticut show a compelling interest in regulating the participation of unaffiliated voters in primary elections, this Court should reverse the decision of the Court below.

ARGUMENT

I. BEFORE ASSESSING THE STATE'S INTEREST, A COURT MUST FIRST DETERMINE THE EXTENT TO WHICH BARRING UNAFFILIATED VOTERS FROM PARTICIPATING IN A PARTY PRIMARY ELECTION INFRINGES ON THE PARTY MEMBERS' FREEDOM OF ASSOCIATION.

The constitutional analysis which this Court should apply in the instant case is a straightforward extension of *Marchioro v. Chaney*, 442 U.S. 191 (1979), a case not considered by either of the lower courts here.

Marchioro recognizes a constitutional collective freedom of association possessed by members of political parties, as well as a basis for state regulation of certain activities in which political parties engage, and provides a procedural and substantive guideline for judicial reconciliation of these often conflicting principles. That guideline procedurally requires that a court first determine whether the freedom of association is substantially infringed by state regulation. If it is, but *only* if it is, the court must evaluate whether the state has a compelling interest in regulating the activity. Otherwise, the state need only show a legitimate interest in the regulation in question.

Substantively, this two-step procedure permits the recognition that all assertions of a political party's right to be free from regulation are not equally precious. State regulation may, for example, prevent the very existence of a party as an expressive association. Surely the state must then demonstrate a compelling interest in destroying the party's ability to communicate a coherent message. On other occasions, as here, the regulation of the state may be minimal, not precluding or penalizing the exercise of an essential expressive function. In such a situation, *Marchioro* permits the power of the state to be employed if the state can demonstrate a valid, rational reason for its action, as it has done here.

Some statements by lower courts, especially when the exercise of state regulatory power over primary elections was first questioned, may be read broadly to appear to grant an almost total discretion to states to regulate at least those activities of political parties which touch on elections. An early South Dakota decision, quoted in a 1920s study of primary elections, asserts that " 'we are aware of no decision wherein it is held that the legislature is without power to prescribe any mandatory rule whatever for the regulation of party procedure so far as it concerns nominations to public office.' " *Healey v. Wipf*, 22 S.D. 343, 117 N.W. 521, 522 (1908), as quoted by C.E. Merriam and L. Overacker, *Primary Elections* 119 (1928). The statement by this Court in *Storer v. Brown*, 415 U.S. 724 (1974), that "[i]t is very unlikely that all or even a large portion of the state election laws would fail to pass muster under our cases," *id.* at 730, might also be read, standing alone, to confer this Court's imprimatur on any election-related state statute. A three-judge district court in Connecticut has also observed that "[t]he states have broad discretion in formulating election policies." *Tansley v. Grasso*, 315 F. Supp. 513, 519 (D. Conn. 1970). Such observations might appear to justify any state law which could be interpreted to affect an election, regardless of the remoteness of the impact, or the adverse effect it might have on associational freedom.

But there must be limits to such state regulation, lest it be possible "for a Democratic legislature to make the test [of party allegiance] at a primary election a belief in free coinage of silver, or Republicans to make adherence to a protective tariff a requirement," as Merriam and Overacker, *supra* at 125, summarize a California court's opinion. Although primary election laws "regulating the internal affairs of a political party" were "universally conceded to be constitutional," Merriam and Overacker observe that "[t]he courts were careful to point out . . . that this legislative power to regulate party affairs must be exercised within the bounds of reason and not arbitrarily." *Supra* at 120.

On the other hand, appellee Republican Party in this case essentially argues that the freedom of collective association constitutionally prevents the state of Connecticut from statutorily barring voters unaffiliated with the Party from voting in a primary election to nominate candidates of the Party if the Party, by Party rule, decides to permit such unaffiliated voters to participate. Specifically, appellees' claim in this case is that the state of Connecticut, in pursuing the goal of protecting the members of a political party from intrusion by others, may do so only if it has demonstrated a compelling interest.

Such an argument stands the freedom of collective association on its head. Those commentators who have addressed the issue have almost uniformly defended a collective freedom of association because of their belief that political parties should be free from intruders, thrust upon them by state action, who could distort the collective choice of those who are members of the group. See S. Gottlieb, "Rebuilding the Right of Association: the Right to Hold a Convention as a Test Case," 11 Hofstra L. Rev. 191 (1982), C.L. Carr and G.L. Scott, "The Constitutionality of State Primary Systems: An Associational Rights Analysis," 10 J. Contemp. Law 83 (1984) and G.L. Scott and C.L. Carr, "Political Parties Before the Bar: The Controversy Over Associational Rights," 5 Univ. of Puget Sound L. Rev. 267 (1982). Dicta in a number of cases in this Court and in lower courts indicate a similar reason for insisting on the right of association. *See, e.g., Cousins v. Wigoda,* 419 U.S. 477 (1975), *Democratic Party of the United States v. Wisconsin ex rel. LaFollette,* 450 U.S. 107 (1981), and *Roberts v. Jaycees,* U.S. , 104 S.Ct. 3244 (1984).

It would indeed be ironic should the freedom of collective association now be applied to prevent the state of Connecticut from achieving an end which the freedom of association is supposed to facilitate: the protection of groups from invasion by those with different beliefs.

II. DECISIONS OF THIS COURT HAVE ESTABLISHED THE STANDARD FOR EVALUATING WHETHER LEGISLATIVE ENACTMENTS, SUCH AS CONNECTICUT'S PROHIBITION OF UNAFFILIATED VOTER PARTICIPATION IN PARTY PRIMARY ELECTIONS, UNCONSTITUTIONALLY INFRINGE FREEDOM OF ASSOCIATION.

This Court, in a long line of cases dealing with the power of a state to regulate various activities of a political party, has clearly and undeviatingly established the standard of review to be applied, a standard fully elaborated in *Marchioro* and other cases. A judicial inquiry must *first* determine if a state law imposes "substantial burdens on the freedom to associate" or if only "minor restrictions on associational activities" are imposed. Note, "It's My Party and I'll Cry If I Want To: State Intrusions Upon the Associational Freedoms of Political Parties—*Democratic Party of the United States v. Wisconsin ex rel. LaFollette*," 1983 Wis. L. Rev. 211, 220. Only then does the court proceed to the second step of the analysis, which varies according to the decision at the first step.

If, on the one hand, as in *Democratic Party, supra*, the Court finds a "substantial intrusion into the associational freedom of members of the National Party," *id.* at 126, the Court must then consider "whether the State has compelling interests that will justify the imposition of its will" on the party. *Id.* at 124. In *Kusper v. Pontikes*, 414 U.S. 51 (1973), this Court first considered whether the statute there at issue "substantially restrict[ed]" the voter's right to change his affiliation, *id.* at 57. Only when it had determined that there had been a "significant encroachment upon associational freedom," *id.* at 58, did it proceed to evaluate the extent of Illinois' interest, stating that the interference "could not be justified upon a mere showing of a legitimate state interest." *Id.* at 58. In *Cousins v. Wigoda, supra*, this Court also apparently first considered the petitioners' contention that the injunction there at issue was a " 'significant interference' with

protected rights of political association." *Id.* at 488. Only then did it proceed to determine if "Illinois had a compelling interest." *Id.* at 489. Also apposite to this inquiry is *Storer v. Brown*, 415 U.S. 724 (1974), dealing with a California disaffiliation requirement for candidates. Citing *Williams v. Rhodes*, 393 U.S. 23 (1968), this Court stated the requirement that there first must be a finding that the statute "severely burdened the right to associate for political purposes;" if so, then the discriminations "had to be justified by compelling state interests." *Storer, supra* at 729. In each instance, the plaintiff had to meet the initial burden of showing that his associational right had been substantially restricted before the Court would even consider whether the state's interests were compelling.

If, on the other hand, as in *Marchioro v. Chaney, supra*, this Court finds that "there can be no complaint that the party's right to govern itself has been substantially burdened by statute," *id.* at 199, this Court then must only determine if the state's interest is "legitimate." *Id.* at 196. The *Marchioro* Court specifically distinguished *Cousins:* "In *Cousins*, unlike this case, there was a substantial burden on associational freedoms. This fact alone distinguishes the two cases, and renders *Cousins* inapposite." *Id.* at 199 n.15. Moreover, it summarized with approval the ruling of the Washington Supreme Court:

> The state court reasoned that although " 'substantial burdens' " on the right to associate for political purposes are invalid unless " 'essential to serve a compelling state interest,' " these appellants failed to establish that this statute had imposed any such burden on their attempts to achieve the objectives of the Democratic Party. Since this initial burden had not been met, the court upheld the constitutionality of the challenged statute.

Id. at 195 (footnote omitted).

The standard employed in these cases confirms "the analytic paradigm employed in determining the constitutionality of state impingements upon party autonomy" which one leading commentator suggested in 1978: "mild restrictions on political parties must relate rationally to some legitimate state interest; if a state rule substantially erodes the freedom of association of party members, however, the rule will be upheld only if it is shown necessary to serve a compelling state interest." L. Tribe, *American Constitutional Law* 786 (1978).

In the instant case, however, the Circuit Court "was constrained to conclude" only that *"to some limited extent"* Connecticut had placed restrictions on the state Republican Party. See J.S. App. at 111 (emphasis added). Despite this evaluation, the Circuit Court then held, in a clear misapplication of this Court's rulings, that the compelling interest test must be used to determine whether the regulation was constitutionally justified.

III. THERE HAS BEEN NO SUBSTANTIAL INFRINGEMENT OF APPELLEES' FREEDOM OF ASSOCIATION.

As in *Marchioro v. Chaney*, the "initial burden," *supra* at 195, of demonstrating that the state has imposed a substantial restriction on the right of association has not been met. This Court has not left lower courts in the dark in defining the standard to be applied, but has clearly established criteria for measuring "substantial burden."

A. The Party's Associational Right To Attract New Members Is Not Substantially Burdened.

Connecticut has not substantially interfered with the right of members of the Republican Party to associate with whomever they desire to attract to membership in their party.

Unlike the requirement which locked a voter into a pre-existing party affiliation, declared unconstitutional by this Court in *Kusper v. Pontikes, supra*, and even unlike the delayed-enrollment scheme upheld in *Rosario v. Rockefeller*, 410 U.S. 752 (1973), Connecticut specifically permits Connecticut Republicans to continue to attract party members by permitting them to affiliate with the party until noon of the business day before a primary election. Conn. Gen. Stat. § 9-56. There is no 23-month waiting period before affiliation takes effect, which in essence "absolutely preclude[d]" the appellee in *Kusper* from voting in her chosen party's primary, and thus absolutely barred members of that party from attracting her support during that period. *Kusper, supra* at 58. The statute here "does not freeze the status quo," *Anderson v. Celebrezze*, 460 U.S. 780, 806 at 817 (1983) (Rehnquist, with White, Powell, and O'Connor, dissenting) which all Justices of this Court agreed was impermissible in the context of filing deadlines on presidential candidates imposed by Ohio. *Id.* at 794.

Even if it may be assumed, *arguendo*, that it is crucial to a party's electoral success at the general election to attract new members during the primary election campaign—an assumption which may be empirically baseless—the state erects no substantial barrier here. The Party is able to place a host of potential candidates for its nomination in the field. They may campaign actively, seeking the support not merely of party members, but of unaffiliated voters, free to solicit and encourage them to affiliate with the party and add to its numbers, *until the day before the primary election.* All that is minimally required is that those whom the party is able to attract to its ranks declare their allegiance to the party by registering with it one day before they cast their vote.

Professor Tribe concludes, after an analysis of *Kusper, supra*, and *Rosario, supra*, that "contemporaneous affiliation," a requirement essentially similar to Connecticut's one-day waiting period, is justifiable. In terms as applicable to the party members' collective freedom of association as to an individual's right to associate, he suggests that "[a]bsent a

willingness to profess such affiliation, it would be tenuous to assert that substantial associational rights were being abridged; without a commonality of interest, there is little association to abridge." Tribe, *supra* at 793.

B. Connecticut Has Not Substantially Interfered With The Internal Organization Or Affairs Of The Group Which Has Associated To Pursue Political Ends.

1. The state is not forcing the Party to accept members who may distort its views.

Unlike the Illinois state law found to be superseded by the decision of the Democratic national convention in *Cousins v. Wigoda, supra,* unlike the Wisconsin rule which bound the Wisconsin delegates to the national party convention to honor the results of the Wisconsin open primary in voting for presidential candidates, declared void in *Democratic Party, supra,* and unlike certain other government actions referred to in *Roberts v. Jaycees, supra,* as infringing on the right to associate for expressive purposes, the Connecticut statute does not intrude "into the internal structure or affairs of an association" in that it does *not* "force[ ] the group to accept members it does not desire." It does *not* "impair the ability of the original members to express only those views that brought them together." *Roberts v. Jaycees, supra* at 3252. Like the Minnesota Human Rights Act upheld by the Court in *Roberts,* the statute "requires no change in . . . creed . . . and it imposes no restrictions on the organization's ability to exclude individuals with ideologies or philosophies different from those of existing members." *Roberts, supra* at 3254. On the contrary, the Connecticut statute here at issue, Conn. Gen. Stat. § 9-431, seeks to *protect* the associational rights of members of the Republican Party from interlopers.

2. The state is not hindering the Party's internal, non-electoral decision-making process.

Unlike the actions of Illinois in *Cousins v. Wigoda, supra,* which sought to override the internal rules of the Democratic Party for the selection of delegates to be seated at its national convention, and unlike the Wisconsin statute in *Democratic Party v. Wisconsin, supra,* which bound by state law votes of delegates to the national convention, the Connecticut statute here in question does not deal with the *internal* processes of the Republican Party, but with a primary election which determines which candidate will be granted access to the general election ballot.

Marchioro v. Chaney, supra, clearly distinguishes " 'purely internal party decisions,' " *id.* at 197, from the "critical role played by political parties in the process of selecting and electing candidates for state and national office." *Id.* at 196. This Court classified as internal functions the State Committee's power to

> act as the party's governing body when the Convention is in adjournment [,] . . . authority to organize and administer the party's administrative apparatus, to raise and distribute funds to candidates, to conduct workshops, to instruct candidates on effective campaign procedures and organization, and generally to further the party's objectives of influencing policy and electing its adherents to public office.

Id. at 193.

Regulation of these matters might well be a significant infringement of associational freedom. However, statutes which regulate "the orderly participation of the political party in the electoral process," *id.* at 197, are supportable. "The State's interest in ensuring that this process is conducted in a fair and orderly fashion is unquestionably legitimate; 'as a practical matter, there must be a substantial regulation of elections

if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes.' " *Id.* at 196, quoting *Storer v. Brown, supra* at 730.

In the instant case, the Connecticut Republican Party does not even purport to be defining criteria for party *membership*. The Party rule involved here does not deal with membership in the Party *per se*, or with standards for determining membership—because those who vote in the primary do *not* by that act become party members—but only with who may participate in the state *electoral* process of selecting people who will receive the party's nomination for state office. This matter clearly falls under the rubric of electoral decision-making and hence is not internal.

3. The Party is not a purely private organization.

Unlike the various state actions which sought disclosure of the membership lists of private organizations, such as those struck down in *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958) and *Bates v. City of Little Rock*, 361 U.S. 516 (1960), and unlike other statutes considered in cases cited in *Roberts v. Jaycees, supra* at 3250–52, the Connecticut statute here does not regulate a purely private organization, the members of which have an "intrinsic" right to "enter into and maintain certain intimate human relationships [which] must be secured against undue intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme." *Id.* at 3249. The Republican Party is not distinguished by its "relative smallness, a high degree of selectivity in decisions to begin and maintain the affiliation, and seclusion from others in critical aspects of the relationship." *Id.* at 3250. Indeed, the names of those affiliated with the Republican Party or any other political party are open to anyone for public inspection, and are disseminated widely so that the affiliated voters may be targeted to receive information. Conn. Gen. Stat. § 9-55. There has been no showing in this case that the Party

"employs any criteria for judging applicants for membership." *Roberts, supra* at 3251.

As the Fourth Circuit Court of Appeals observed in another context in *Rice v. Elmore*, "The fundamental error in [South Carolina's] position consists in the premise that a political party is a mere private aggregation of individuals, like a country club, and that the primary is a mere piece of party machinery." 165 F. 2d. 387, 389 (4th Cir. 1947) (footnote omitted).

C. The National Party's Rules And Decisions Are Not Regulated By The State, And The Connecticut Statute Has No Extra-Territorial Reach.

This Court has never expressly ruled on the question of whether states may regulate the conduct of primary elections by *state* parties which determine the party's nominee in a *state* election. The majority in *Cousins* emphasized that "the only question that we decide today," *id.* at 483 n.4, is "whether the Appellate Court was correct in according primacy to state law over the National Party's rules in the determination of the qualifications and eligibility of delegates to the Party's National Convention," *id.* at 483, a view with which Justice Powell agreed: "state regulation of state primaries or conventions for state offices raises different considerations requiring a wholly different balance." *Id.* at 496, 497 n.* (Powell, J., concurring and dissenting).

But unlike the injunction overturned in *Cousins, supra*, unlike the statute struck down in *Democratic Party, supra*, and unlike the early filing deadline for Presidential candidates declared void in *Celebrezze, supra*, the Connecticut statute does not have extra-territorial application. It does *not* "seriously undercut or indeed destroy the effectiveness of the National Party Convention" which "serves the pervasive

national interest in the selection of candidates for national office," which "national interest is greater than any interest of an individual State." *Cousins v. Wigoda, supra* at 490. Here no state restriction is imposed on a "nationwide electoral process," which the "State has a less important interest in regulating . . . than statewide or local elections, because the outcome of the former will be largely determined by voters beyond the State's boundaries." *Anderson v. Celebrezze, supra* at 795.

Indeed, the possibility of conflict between state regulation and national rules does not even arise with the Republican Party in Connecticut, or in any other state. In the one instance in which a conflict might exist, in the selection of delegates to the national convention, "Republican rules maintain that state laws shall govern in any conflict with state party procedures." Note, "Freedom of Association and State Regulation of Delegate Selection: Potential for Conflict at the 1984 Democratic National Convention," 36 Vand. L. Rev. 105, 105 n.3 (1983).

IV. CONNECTICUT'S LEGITIMATE INTERESTS IN ADOPTING THE REGULATION HERE INCLUDE ENCOURAGING PARTY COHESION, SHARPENING POLITICAL DEBATE, AND PREVENTING DISTORTION OF THE ELECTORAL PROCESS.

Although states which adopted statutes or regulations possessing any of the foregoing attributes might be required to demonstrate a compelling state interest, Connecticut need only show that it had a legitimate state interest in adopting the statute here in question. On the basis of the important ends to be achieved, and on the authority of prior cases, it can accomplish—and indeed has accomplished—that task.

The legitimate interest of the state in regulating primary elections was in early cases justified in part as a protection

against fraud, bribery and other evils, in part because of the sovereign power of the state, and in part as a logical extension of the adoption of the "Australian ballot" (a secret ballot listing all candidates who qualify for an office, prepared, distributed and tabulated by government officials at public expense, used by all states since 1888).

> The easiest, and what might be termed the typically legal, method of upholding a primary law is to declare that its provisions are a part of the Australian ballot law. Since certain parties are accorded under this plan special privileges upon the ballot, they must in return submit to special requirements. The privilege of having the names of candidates placed upon the ballot upon certification of party officials, instead of by petition, is, so the argument runs, to be paid for by minute legal regulation of the procedure of the party.
>
> Justice Holmes stated this clearly when he said in *Commonwealth v. Rogers:* "The legislature has a right to attach reasonable conditions to that advantage, if it has a right to grant the advantage"—that is, the right to have the names of candidates placed upon the ballot without a petition.

Merriam and Overacker, *supra* at 119, quoting Holmes in *Commonwealth v. Rogers,* 181 Mass. 184, 63 N.E. 421, 423 (1902). *See generally,* Merriam and Overacker, *supra* at 108–140.

The state recognizes and encourages major political party participation in the electoral process by establishing a state-funded and regulated system of conventions and primaries leading to the general election. The major parties may choose to utilize this route for nomination of their candidates in the general election, or members of those parties may use alternative methods, such as petitioning, to qualify candidates for the ballot. The Republican Party in this case seeks to use the first alternative, the state created primary system, while at

the same time undermining that system and causing confusion among the parties and voters. The state certainly has a legitimate interest in maintaining order, political coherency, and stability in the nominating process it created.

Ultimately, however, the most important interest to be protected by state regulation of the party affiliation of voters in primary elections is the enhancement of the quality of political debate through clear articulation of competitive policies by cohesive political parties. A state may legitimately foster the development of a political system in which the short-term interests of a temporary candidate coalition do not undermine the long-term interest of the public in a robust debate. A state may legitimately wish to encourage positions on issues which are clearly defined and carefully framed by the members of a party who have consciously determined that they want to associate themselves with others of a like mind. A state may legitimately choose to prevent the circumvention of the members of an association by intruders who temporarily intervene "not in order to support a principle or policy," C.A. Berdahl, "Party Membership in the United States, I," 36 Am. Pol. Sci. Rev. 16, 42 (1942), but to gain an advantage by fragmenting, rather than solidifying, the association.

As this Court summarized in *Anderson v. Celebrezze*, *supra*, "the State's important regulatory interests are generally sufficient to justify reasonable, nondiscriminatory restrictions," *id.* at 788, such as those "that protect the integrity and reliability of the electoral process itself." *Id.* at 788 n.9. Specifically, a state "has the right to prevent distortion of the electoral process," *id.*, which can occur when voters not affiliated with a party decide to cast ballots in that party's primary. Whether impelled by a deliberate desire to seek the nomination of the candidate least likely to win the general election, or simply attracted by an exciting campaign, independent or unaffiliated voters can dilute the preferences of party members, an outcome which the state has a legitimate interest in preventing.

Courts have recognized that a "state has a legitimate interest in protecting party members' associational rights, by legislating to protect the party 'from intrusion by those with adverse political principles,' " as a three-judge District Court wrote in 1976 concerning the statute here at issue. *Nader v. Schaffer*, 417 F. Supp. 837, 845 (D. Conn. 1976), *aff'd mem.*, 426 U.S. 989 (1976), quoting *Ray v. Blair*, 343 U.S. 214, 221-22 (1952). The *Nader* court continued:

> In addition to protecting the associational rights of party members, a state has a more general, but equally legitimate, interest in protecting the overall integrity of the historic electoral process. This includes preserving parties as viable and identifiable interest groups; insuring that the results of primary elections, in a broad sense, accurately reflect the voting of party members. Parties should be able to avoid primary election outcomes which will confuse or mislead the general electorate to the extent it relies on party labels as representative of certain ideologies, and preventing fraudulent and deceptive conduct which mars the nominating process."

Nader v. Schaffer, supra at 845.

In a subsequent, similar case, the Supreme Court of New Jersey referred to at least two important interests served by a closed primary election system with a durational affiliation requirement. "First, such a system supports the associational rights of party members." *Smith v. Penta*, 81 N.J. 65, 77, 405 A.2d 350, 356 (1979). Excluding non-members of the party prevents "an erosion in the cohesive partisanship that is basic to the party's strength." Because participants in the primary are not merely members of the general public, but those who adhere to a particular political philosophy, party members may "advance their goals, proselytize their beliefs and seek to acquire or perpetuate their power." The court concluded that "[t]hese interests—and others as well—are the associational values which state legislation may properly protect." *Id.* The state also has a second "strong public interest in maintaining the integrity of the electoral process." *Id.*

This Court has reached a similar conclusion concerning the legitimacy of establishing a cutoff point for registration or party enrollment in New York: the purpose of New York's statute was to "inhibit party 'raiding,' whereby voters in sympathy with one party"—not just members— "designate themselves as voters of another party so as to influence or determine the results of the other party's primary." *Rosario v. Rockefeller, supra* at 760. This Court then said, "It is clear that preservation of the integrity of the electoral process is a legitimate and valid state goal." Id. at 761. This Court also referred to the "legitimate interest of Illinois in preventing 'raiding,' " in *Kusper, supra* at 61, even though the particular method chosen did not pass constitutional muster.

Certainly, this Court has recognized that protection of party members from intrusion by others is in general a necessary concomitant of the freedom of association. In *Democratic Party,* this Court stated—there in reference to a political party's own rules which excluded non-party members from selection of delegates— "[T]he freedom to associate for the 'common advancement of political beliefs' necessarily presupposes the freedom to identify the people who constitute the association, and to *limit* the association to those people only." *Supra* at 122 (internal citation omitted and emphasis added). This Court then cited with approval Professor Tribe's comment that " '[f]reedom of association would prove an empty guarantee if associations could not limit control over their decisions to those who share the interests and persuasions that underlie the association's being.' " L. Tribe, *supra* at 791, quoted in *Democratic Party, supra* at 122 n.22. The Court added that it had recognized on several occasions "that the inclusion of persons unaffiliated with a political party may seriously distort its collective decisions—thus impairing the party's essential functions." *Id.* at 122. Protecting the political party members' associational rights is not only a legitimate interest of the state but essential to its protection of the integrity of the electoral process.

V. POLITICAL SCIENTISTS HAVE CONCLUDED THAT DISTORTION OF THE VIEWS OF PARTY MEMBERS MAY OCCUR IN PRIMARY ELECTIONS OPEN TO ALL VOTERS, THUS DIMINISHING THE COHESIVENESS OF THE PARTY, AND ACCORDINGLY HAVE SUGGESTED THAT UNAFFILIATED VOTERS BE BARRED FROM PRIMARY ELECTIONS.

The very reason a political party exists is to articulate and fight for the implementation of certain public policies. Those policies, and the principles underlying them, flow from the expressed desires of members of the political party.

At the same time, a political party, the policies it espouses, and its candidates are intertwined inextricably. Candidates personify the party, and thus the selection of a candidate is one of a political party's most important functions. As E.E. Schattschneider, perhaps the foremost analyst of American political parties in this century, has said, "The nominating process thus has become the crucial process of the party. The nature of the nominating procedure determines the nature of the party; he who can make the nomination is the owner of the party." E. Schattschneider, *Party Government* 64 (1942).

Members of political parties nominate their candidates for public office by convention, by direct primary, or by a challenge primary following a convention. The latter scenario occurs in Connecticut when a candidate receives more than twenty per cent of the votes cast by the delegates to a convention, and chooses to press his candidacy further. See Conn. Gen. Stat. §§ 9-400, 415.

When a party chooses its candidates for a general election at a convention, it usually also adopts a platform stating its principles. That platform, on which its candidate stands, is likely to be a model desired by the leading candidate for the party's nomination, whose supporters—members of the political party—dominate not only the nomination process,

but also the process of building the platform. S. Morehouse, *State Politics, Parties and Policy* 190 (1981).

When a candidate is chosen through the mechanism of a primary election, the only political principles defended by the party are those espoused by the winner of the primary. In the case of a challenge primary, like Connecticut's, the platform adopted by the convention will have been bypassed if the winner is other than the nominee of the convention. The political principles for which the party campaigns are accordingly defined, either in a direct primary or a challenge primary, by the voters who participate in that primary.

If those participants are the same as those who associate with each other, as members of a party, for the purpose of influencing public policy in a particular way, then no problem exists. But if others, including some who have formally associated with another party, participate in that primary, and they have candidate preferences which differ from those of the members of the party that is conducting the primary election, then the principles which the members of the party favor will have been distorted by the intruders.

It is possible, in the abstract, that independents and self-declared members of party B would choose not to participate in the primary of party A, even if they were permitted to do so. And it is also possible that, since there are either no tests for party membership, or the tests are unenforceable, members of party B could dissemble and declare themselves to be members of party A and participate in party A's primary even when they supposedly were excluded. J. Lengle, *Representation and Presidential Primaries: The Democratic Party in the Post-Reform Era* 100 (1980). But research has found that either possibility occurs only minimally in actual practice. Political scientists Hedlund, Watts and Hedge have observed that more than forty per cent of the voters in the open Wisconsin presidential primaries from 1968 through 1980 were not members of the party in whose primary election they voted. And the same authors observed that less than five per cent

of party identifiers voted in the other party's primary in 1976 in Florida, Pennsylvania, and California, where primaries were closed. R. Hedlund, M.W. Watts, and D.M. Hedge, "Voting in an Open Primary," 10 Am. Pol. Q. 197, 201-04 (1982).

It is also possible that the candidates, and thus the political principles, favored by party affiliators do not differ from the candidates and political principles favored by those who do not ally themselves with the party but vote in the primary election anyway. Recent research has demonstrated, however, that results of open primaries are in fact different from the results which would occur in those elections if they had been closed to outsiders. Professor Gary Orren has concluded that Gary Hart "owed to independents his margin of victory [over Walter Mondale in the 1984 Democratic primaries] in several states that permitted independents or Republicans to pick up Democratic ballots. These included New Hampshire and Indiana, where he ran just even with Mondale among Democrats, and Ohio, where he won the primary even though he lost the Democratic vote." G. Orren, "The Nomination Process: Vicissitudes of Candidate Selection," in *The Elections of 1984* at 27, 66-67 (M. Nelson ed. 1985) (internal footnote omitted). To the extent that Hart's victories in those states made his campaign for the nomination appear more viable for a longer period of time, the expressed preferences of those voters unaffiliated with the Democratic party weakened the candidacy of the contender favored by those who were members of the association.

Similar distortions occurred in the 1972 Democratic presidential primaries in Wisconsin and Michigan, both of which were open to voters other than members of the Democratic party. In both states, the candidate preferences of non-Democrats differed from those of Democrats: in Wisconsin, Hubert Humphrey would have narrowly defeated George McGovern if the contest had not been open to Republicans and independents. With the votes of these intruders, however, McGovern won convincingly: "the victory reinvigorated his slumping campaign." Although the order

of finish of the candidates would not have been altered in the Michigan open primary, Humphrey's share of the delegates chosen would have increased if the participants had been limited to Democrats. Political scientist James Lengle concludes that, in an open primary, "the effect of partisan-related candidate preferences is to distort both the voice of party members and the strength of the party's presidential contenders." Lengle, *supra* at 100, *see generally* 98–103. *See also* D. Adamany, "Cross-Over Voting and the Democratic Party's Reform Rules," 70 Am. Pol. Sci. Rev. 536 (1976), cited extensively by this Court in *Democratic Party, supra.* (Adamany's data, which indicated greater support for McGovern than he actually received, were, as the author states, somewhat contaminated by a halo effect, inasmuch as voters were not sampled until after the general election. Adamany, *supra* at 537.)

One may praise or condemn the results of these particular primary elections. The point is that those persons who associated with the party for the purpose of expressing their political views had their preferences as to candidates—and the policies consequently espoused by their party—altered or distorted because of interlopers in their association. Those intruders may not have been bent on "raiding"; they may have voted in that primary only because of the absence of an exciting race in the other party's primary. (Lengle did not believe that there was an organized Republican raid in the open Democratic primaries in either Wisconsin or Michigan in 1972. Lengle, *supra* at 102.) But their participation in the primary election on the same terms as *bona fide* members of the party nevertheless distorted the very expression of views for which the members entered into that association. As David E. Price concludes, "Open primaries dilute the impact of the parties' core constituencies." D. Price, *Bringing Back the Parties* 132 (1984).

The Committee on Political Parties of the American Political Science Association (APSA) anticipated these empirical findings when it made its recommendations in 1950. "The meaning of [party] membership itself suggests that those who

identify themselves with the group have something in common which they do not share with those outside it." Committee on Political Parties, *Toward a More Responsible Two-Party System* 66 (American Political Science Association, 1950). The APSA Committee accordingly recommended the adoption of the closed primary, because "it tends to support the concept of the party as an association of like-minded people. On the other hand, *the open primary tends to destroy the concept of membership as the basis of party organization.*" *Id.* at 71 (emphasis in original).

Political scientists have observed that closed primary elections produce other benefits which are conducive to cohesive parties. The lists of party enrollees generated by registration prior to a closed primary are "invaluable tools for the parties as they undertake voter registration and get-out-the-vote drives and other efforts at communication and organization." Price, *supra* at 132. Because control of the nomination is in the hands of the same people who choose the leaders of the party organization, "candidates and officeholders have stronger incentives to work with party organizers and to support party positions." *Id.* Recruitment of candidates by party leaders may be facilitated because there is a greater assurance that the carefully chosen recruit will win the primary. Morehouse, *supra* at 177.

In addition, as V.O. Key observes, "the open primary at times makes difficult the maintenance of orientations differentiating the two parties and probably handicaps the lesser party in those jurisdictions in which one party holds a substantial advantage. The voters of the lesser party may find it more attractive to exercise a balance of power in the primary of the major party than to engage in the troublesome task of building up their own party." V.O. Key, *Politics, Parties, & Pressure Groups* 392 (5th ed. 1964). (Malcolm Jewell has hypothesized, contrary to Key, that in states with open primary laws, "minority parties might attract more interest in their primary, nominate candidates with broader appeal, and win more elections." M. Jewell, "Political Parties, Courts,

and the Nominating Process," Paper presented to the Southern Political Science Association, November 7-9, 1985, p. 10. But Jewell finds the evidence inconclusive: "If the closed primary is a serious obstacle to minority parties, this is most likely to be true in southern and border states where registration and primary turnout heavily favor the Democratic party." *Id.* at 11. Jewell observes, however, that only in North Carolina, Florida, and Tennessee have Republicans attracted large numbers of voters to their primaries, and "it is noteworthy that North Carolina and Florida are the only two southern states (except Louisiana) to have closed primary laws." *Id.* He concludes: "There is not yet convincing evidence that closed primary laws have significantly handicapped southern Republican parties in practice as well as in theory." *Id.* at 12. *See also* M. Jewell, *Parties and Primaries: Nominating State Governors* (1984), in which Jewell asserts that while it may be logical to think that "a closed primary benefits the majority party . . . it is difficult to find examples in specific states to prove it." *Id.* at 222.)

Moreover, the open primary may reduce the quality of debate about state policy issues. The need for candidates to make themselves attractive to the entire electorate at the primary stage may force them to de-emphasize the formulation of differences in policy between the parties and appeal to voters in what has become "the first round of the general election" on the basis of personality, image and "freewheeling candidate and issue appeals based outside the parties." Price, *supra* at 132.

Given the array of benefits of closed primaries and disadvantages of open primaries for the political system in general, political scientists have recommended that "party leaders and legislators in states with open-primary and same-day systems would do well to examine their debilitating effects on parties and to consider corrective action." Price, *supra* at 132. (In "same-day" registration systems, which require no party affiliation in advance, voters declare their preference for parties at the polls.)

As Sarah McCally Morehouse concludes her leading text on state politics, "It is certainly not too much to ask that those who help select the party nominee in a primary should be party members with more than a passing attachment to the party . . . . State laws should restrict voting in primaries to those who have registered with a party. . . ." S. Morehouse, *supra* at 488.

States need not follow the advice of the professors, of course, but should a state legislature conclude that it desires to adopt the public policy of strengthening the party system within its borders, there are certainly valid reasons to support the legislature's conclusion. The state would surely have at least a legitimate interest in fostering a cohesive party system, in preventing the dilution and/or alteration of the views of the members of political parties, and in protecting the associations formed to espouse the adoption of certain principles of public policy from intrusion by those preferring different policies and different candidates.

VI. DEPARTING FROM THE STANDARD OF REVIEW ESTABLISHED BY THIS COURT, AND FOLLOWING THE CIRCUIT COURT'S ANALYSIS, MAY CALL INTO QUESTION MANY ELECTORAL LAWS OF THE STATES.

If this Court upholds the opinion below, amici submit that other state regulations of electoral activity may also be called into question. Political parties might be able to use their rule-making authority to exempt themselves, practically at will, from the ambit of such laws as those

—requiring a state convention to determine a political party's nominee for statewide office, Conn. Gen. Stat. § 9-382;

—guaranteeing a candidate for nomination, defeated by vote of a convention, the right to challenge the party's nominee in a primary if the loser received more than twenty percent of the convention's vote on any ballot, Conn. Gen. Stat. § 9-400;

—guaranteeing the right to a primary for offices voted upon only by electors in one town, Conn. Gen. Stat. §§ 9-405, 9-406;

—preventing members of another party—not just unaffiliated voters—from voting in a primary election, Conn. Gen. Stat. §§ 9-56, 9-59, 9-431;

—preventing voting by proxy or by absentee ballot in a primary by those who do not meet the qualifications for voting by absentee ballot, Conn. Gen. Stat. § 9-135;

—prohibiting corporate contributions to candidates in primary elections, Conn. Gen. Stat. § 9-336b;

—limiting the amount of contributions by an individual to a candidate in a primary election, Conn. Gen. Stat. § 9-348r;

—preventing non-residents of a district, or non-registered persons, including non-citizens or underage persons, from voting in primary elections, Conn. Gen. Stat. §§ 9-361, 9-431;

—permitting electors to seek judicial relief from decisions made by election officials concerning the procedures or results of a primary election, Conn. Gen. Stat. § 9-328.

Some of these regulatory statutes may be justified by a compelling state interest, and others may be justified by a legitimate state interest rather than a compelling one, but they would surely all be thrown into question by a decision of this Court overturning or limiting previous Court decisions and establishing the Circuit Court's standard as the one to be followed in cases of state regulation of primary elections.

CONCLUSION

Appellee Republican Party has contended in the instant case that the collective freedom of association of its members prevents the state of Connecticut from imposing by statute a requirement that only those voters who are affiliated with the Republican Party may vote in its primary elections, unless the state can demonstrate a compelling interest in its prohibition. It has further argued, and the District Court and the Circuit Court have agreed, that the state has not demonstrated such a compelling interest.

Amici respectfully contend, however, that appellee and the courts below have erred in their reading of the decisions of this Court which are relevant here. *Marchioro v. Chaney, supra*, and other cases have clearly established a guide for reconciling the power of the state to regulate elections and the right of party members to associate freely for expressive purposes. The principle of this Court's line of decisions is that a court must first determine if there has been a "substantial infringement" of the right to associate. If so, has the state demonstrated a compelling interest in its regulation? If not, has the state demonstrated a legitimate interest in its regulation?

This Court, moreover, has given explicit guidance as to the criteria which determine if there has been a "significant burden" on the freedom of association. Is the association prevented from attracting new members to its ranks, freezing the political status quo? Is the association forced to accept members it does not desire? Are internal, non-electoral procedures and decisions of the party regulated? Is the association a purely private one, distinguished by its smallness and high degree of selectivity? Does the regulation of the state have an extra-territorial reach, regulating a national association by rules which may be changed only by a small portion of those affected by those rules?

In this case, none of the criteria established by this Court has been satisfied. The Republican Party is *not* prevented from attracting new members. It is *not* forced to accept members it does not desire. Connecticut does *not* regulate the Party's internal aspects. The Party is *not* a purely private association. Connecticut's regulations do *not* attempt to override rules of the national Republican Party; indeed, those rules themselves provide that in case of conflict, state law shall govern. There is accordingly no "substantial burden" on the Party's freedom of association.

Because such a significant infringement does not exist, Connecticut need only demonstrate a legitimate interest in its regulation. Again, this Court and other courts have provided guidance concerning what interests may be recognized as legitimate. A state may act to protect the integrity of the electoral process. It may aim to protect the cohesiveness of political parties, and to protect the expression of their members' views from distortion by intruders.

Because Connecticut has demonstrated the legitimacy of its interest, amici respectfully contend that the Connecticut statute in question is constitutional. This Court should reverse the decision of the Circuit Court of Appeals.

Respectfully submitted,

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